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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALLIED TUBE & CONDUIT CORPORATION,

Petitioner,

vs.

INDIAN HEAD, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

In an effort to influence state and local legislative enactment of the National Electrical Code ("NEC"), a model code prepared by the National Fire Protection Association ("NFPA") that is widely disseminated and adopted in legislative codes, petitioner "packed" an NFPA meeting seeking to prevent inclusion of respondent's product in the NEC on the ground of its toxicity and dangerousness. The action violated no rule of the NFPA. There was specific evidence, believed by petitioner, that respondent's product was unsafe. Petitioner also acted on the recognition, however, that its success at the NFPA would, if followed by legislative enactment of the NEC, restrain the competition of that product. The questions presented are:

1. Whether petitioner's action in the NFPA meeting could be held an actionable restraint of trade leading to treble damages under the Sherman Act consistently with *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and succeeding decisions of this Court further defining the doctrine of that case.

2. Whether, even without regard to the *Noerr* doctrine, such lobbying and voting tactics, otherwise lawful and in compliance with the rules of a code-making association, are proscribed by the Sherman Act if a jury finds they "subvert" the rules.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 817 F.2d 938 (2d Cir. 1987). The oral opinion of the district court (Pet. App. 23a-32a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 22, 1987. A timely petition for rehearing was denied on June 11, 1987. The petition for a writ of certiorari was filed on July 23, 1987 and was granted on October 5, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal.

RULE 28.1 STATEMENT

Allied Tube & Conduit Corporation is a wholly owned subsidiary of Atcor, Inc., which is a wholly owned subsidiary of Tyco, Inc.

STATEMENT OF THE CASE

I. The Facts

The basic facts are well stated in the opinion of the court of appeals (Pet. App. 3a-8a). That account is quoted here for convenience:[1]

"The evidence presented to the district court established the following: Carlon, a division of Indian Head, Inc., manufactures and sells flexible plastic electrical conduit made from polyvinyl chloride (PVC). Electrical conduit is hollow tubing used in building construction to carry insulated electrical wires

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1 Petitioner and respondent have been referred to, respectively, as Allied and Carlon throughout, and those designations are followed in this brief.

through floors, walls, and ceilings, and outside buildings, and to protect the wires from damage or abuse. Carlon's product competes in the marketplace against steel conduit, of which Allied is the largest producer in the United States. Carlon claims that PVC conduit [also known as electrical non-metallic tubing or ENMT] has a number of significant competitive advantages over steel conduit, including its pliability, its lower installed cost, and its lower susceptibility to short circuiting. On the other hand, as the district court instructed the jury, 'there is a scientific basis for a concern about safety of PVC products with respect to toxicity. . . . [T]he parties do not dispute that people disagree on the issue and there is an objective basis for a concern for safety.' Allied particularly stresses the fact that, during fires in high-rise structures, PVC conduit may burn, emitting toxic smoke and fumes.

"This case arises from Allied's efforts to block Carlon's proposal to include PVC conduit as a permissible type of electrical conduit in the 1981 edition of the National Electrical Code (NEC)—a model code, promulgated by the National Fire Protection Association (NFPA), which establishes product and performance requirements for electrical systems, including electrical conduit. The parties agree that NEC is the most widely disseminated and adopted model code in the world. The parties agree further that a substantial number of state and local governments adopt the NEC as law in whole or in part.

"Every three years, the NFPA—a private, voluntary organization composed of over 31,500 individual and group members representing industry, labor, academia, insurance, organized medicine, firefighters, and government—revises the NEC through a multi-step, several-year-long process. The NFPA first submits proposed amendments to the NEC to a Code-Making Panel (CMP) made up of professionals with technical expertise in the area. In order to prevent domination by special interests, no more than one-third of any CMP's membership may represent a single interest. If approved by the CMP, a proposal then goes to the full membership, together with the comments and voting position of each CMP member. After the membership has had an opportunity to comment on the pro-

posal, the CMP considers it a second time, along with the membership's comments. If again proposed, the NFPA publishes the proposed amendment to the full membership. The entire membership then votes.

"In 1980, when Carlon's proposal was being considered, a simple majority of those present at the annual meeting was sufficient to approve or reject a proposal. Disappointed members can appeal the membership's vote to NFPA's Standards Council and ultimately to its Board of Directors. Finally, NFPA rules also permit *de novo* review of a defeated proposal by the CMP, the Standards Council, and the Board of Directors, in a procedure known as a Tentative Interim Amendment (TIA). If adopted, a TIA includes or excludes a proposal on an interim basis until the next code cycle.

"On September 18, 1978, Carlon began the process of obtaining NEC approval for PVC conduit by submitting its proposal, known as Article 331, to the NFPA, along with a fact-finding report by the Underwriters Laboratories. The NFPA directed the proposal to CMP-8, which initially rejected it. However, in December, 1979, based on further fact-finding and field demonstrations by Carlon, CMP-8 reversed its earlier decision and approved Article 331 for review by the full membership. The NFPA then scheduled the article for consideration by the full membership at the next annual meeting, to be held in Boston in May, 1980.

"Recognizing that inclusion of PVC conduit in the NEC might adversely affect its sales of steel conduit, Allied's representatives met with a number of different groups, including other members of the steel industry, to gather votes in opposition to Article 331. On January 30, 1980, the Steel Rigid Conduit and Electrical Section of the National Electrical Manufacturers Association (NEMA) held a meeting to discuss the matter. At that meeting, and at a full meeting of the NEMA Steel Section held in February, everyone agreed to bring as many voters as possible to the upcoming NFPA meeting; Allied itself pledged to bring at least 100 people to vote against Article 331. Additional meetings and communications were

held among the steel interests to coordinate their efforts to block Article 331's adoption. Acting within the letter of NFPA rules, Allied eventually arranged for 155 persons—including employees, sales agents, the agents' employees, company executives, employees of two of Allied's divisions, and the wife of the national sales director—to join the NFPA, to register as voting members, and to attend the annual meeting to vote against the proposal. Allied also paid over $100,000 for the membership, registration, and attendance expenses of these voters. The other steel interests similarly recruited and paid for the expenses of voters at the May, 1980 meeting. In total, the steel interests gathered 230 votes.

"Carlon made no attempt to sign up additional employees or sales agents other than the four already scheduled to attend the meeting. Until about April 18, 1980, H. F. van der Voort, who coordinated Carlon's efforts to amend the NEC, apparently believed that the NFPA's rules did not permit a motion from the floor to return Article 331 to CMP-8. On or about April 18, van der Voort discovered that such a motion could, in fact, be made. By this time, Carlon could not have signed up additional members to vote at the May meeting; under NFPA rules, only those who have been NFPA members for at least 30 days could vote at an annual meeting. However, Carlon did solicit support from members of the Society of Plastics Industry, the NEMA plastics section, other members of the plastics industry, NFPA's railroad and health care sections, and the Fire Marshals Association of North America.

"At the annual meeting, Allied instructed its personnel where to sit, based upon a detailed seating chart, and appointed group leaders to instruct the voters 'how the discussion is progressing and how to vote.' Boxed lunches were provided and the voters were told to 'stay nailed to their seats' until the end of two evening sessions. Group leaders used walkie-talkies and hand signals to facilitate communication. Few of Allied's voters had any of the technical documentation necessary to follow the meeting; nor did any of them speak in opposition to Article 331 in the course of the meeting.

"Two votes were taken on the motion to return Article 331 to CMP-8. The first, a voice vote, was inconclusive. The second, a standing vote, approved the motion by a vote of 394-390. To insure its victory, Allied insisted that its representatives remain in their seats until 2:00 a.m., when the NFPA membership voted to approve the entire NEC, without Article 331. [The voting session began after 1:00 p.m. and lasted 12 hours, with the debate on Article 331 consuming about thirty minutes (Tr. 194-95; 1322; A. 1760-80).[2]] Carlon immediately appealed the decision of the membership to the Standards Council, which referred the appeal to the Board of Directors. Finding that the NFPA rules had been circumvented but not violated, the Board denied the appeal, and returned Article 331 to the CMP-8. In June, 1980, Carlon applied for a TIA including Article 331 in the 1980 NEC. After the proposed TIA wound its way through the various levels of the code-making process, encountering opposition by Allied at each step, a subcommittee of the Board of Directors found that Carlon's request was not sufficiently exigent to warrant issuance of the TIA."[3]

II. The Claims, Defenses and Verdict

A. *The Liability Phase*

Carlon began this action against Allied and the NFPA[4] on October 9, 1981, alleging that they, the American Iron and Steel Institute, other steel conduit manufacturers and Allied's independent sales agents had "combined and conspired to prevent competition from non-metallic tubing by excluding it

2 References preceded by "Tr." are to pages of the trial transcript; those preceded by "A." are to pages in the Joint Appendix in the court of appeals; those preceded by "J.A." are to the Joint Appendix in this Court; and those preceded by "P.X." are to plaintiff's exhibits.

3 The NFPA Board of Directors was greatly concerned about the toxicity issue and "simply did not want to run the risk of compounding the [safety] problem when, in fact, [they] needed considerably more data than was available at the time" (A. 2843-44).

4 In August, 1982, Carlon discontinued its action against the NFPA. Terms of the settlement were not disclosed.

from the 1981 NEC" (J.A. 9). The complaint stated that "[a]s promulgated by defendant NFPA, a private corporation, the NEC is advisory and does not carry the force of law" (J.A. 7). But exclusion from the NEC was nevertheless alleged to cause injury because the NEC is routinely and "widely adopted" as law, "in whole or in substantial part," in statewide and municipal codes (*id.*).

Carlon's injury was alleged to flow directly from that legislative action in adopting the NEC (J.A. 13-14):

> Because of the adoption and application of the NEC by states and municipalities as described in paragraph 13 above, the combination and conspiracy had and continues to have the following unlawful effects, among others:
>
> (a) Carlon has been almost wholly excluded from selling non-metallic tubing in competition with steel tubing manufactured by defendant Allied and others of the co-conspirators.

A bifurcated jury trial commenced on March 4, 1985. Carlon tried the case on its stated theory of liability—that legislative adoption of the NEC was the cause of its injury. Pressing this concept, Carlon's opening to the jury (Tr. March 5, 1985 at 11-12) stressed that

> many states and local statutes expressly adopt the provisions of the NEC in whole or in part and use that as their local law.
>
> [I]t is not disputed in this case that it is necessary that a firm seeking to market a new electrical product, such as electrical non-metallic tubing, must obtain approval for the new product in the National Electric Code, the NEC.

Carlon's evidence emphasized the proposition that any harm it suffered resulted because exclusion of ENMT from the NEC led to the product's exclusion from local statutes. Carlon's main witness, its former Vice President of Industry Affairs, H. F. van der Voort, testified that by virtue of inclusion in the

NEC a manufacturer's product is essentially approved into law in a number of jurisdictions nationwide (Tr. 286-87). He agreed with the court's observation that it is not simply the existence of the NEC, but the widespread reliance on it by state and local governments, that gives the NEC its bite (Tr. 292; *see also* Tr. 904, 990, 992).[5]

In sum, throughout the liability phase of the trial, the district court's early characterization of Carlon's claim remained accurate:

> It seems to be very much conceded in this case that whatever the NFPA does, the state codes will probably incorporate. That is the predicate for [Carlon's] claim of competitive damage. . . .

(Tr. March 4, 1985 at 6). No other theory of liability was ever presented to the jury.

Allied defended on a number of grounds. It did not dispute that it had engaged in an all-out effort to oppose Carlon's product within the NFPA because the NEC is virtually the exclusive basis for governmental regulation of electrical installations within the United States. Instead, its answer asserted that its actions concerning the 1981 NEC "constituted valid lobbying activity" protected under the doctrine of *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) (J.A. 19).

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5 To like effect, the Glossary and Undisputed Facts, a stipulated joint exhibit, states (A. 1557):

> While the NEC is not itself legally operative, its provisions, in whole or in part, form the basis for a significant number of state and local statutes and ordinances regulating electrical installations throughout the country. . . . Because many state and local governmental code authorities rely on the standards established by the NFPA in the NEC, it is necessary that a firm seeking to market a new electrical product covered by the NEC, such as electrical conduit, obtain approval for the product in the NEC.

Allied also asserted, *inter alia*, that its activities were protected under the First Amendment to the Constitution; were based on a good-faith, well founded belief that ENMT in fact constitutes a danger to the public; were intended to make certain the NFPA considered toxicity in connection with Article 331 and other code provisions; and were in conformance with the NFPA's by-laws, standards and procedures (J.A. 18-19). Among other affirmative defenses, Allied asserted that its actions and the alleged conspiracy had not proximately caused any injury to Carlon; any harm to Carlon resulted from the enactment of the NEC by state and local legislatures (J.A. 21).

At the end of the five-week trial on liability, the jury was asked to respond to eleven questions.[6] Its specific findings of fact, as distinguished from its conclusions, were as follows:

- Allied had a genuine belief as of May, 1980 that electrical nonmetallic tubing was unsafe (J.A. 23).
- In opposing Article 331, Allied acted at least in part on its belief that ENMT was unsafe (J.A. 23).
- Allied's conduct did not violate any of the rules or regulations of the NFPA (J.A. 24).
- The NFPA membership vote did not effectively determine whether Article 331 would be excluded from the Code (J.A. 24).
- The NFPA rules and regulations were fair in that they provided a full and effective appeal from the vote of the membership (J.A. 24).
- Allied's conduct did not deprive Carlon of full and effective access to the NFPA (J.A. 24).

In addition, the parties had agreed that the "exclusion of PVC conduit from the 1981 NEC was supported by objective scientific evidence" (Pet. App. 22a).

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6 A twelfth question "Was Allied genuinely attempting to influence the NFPA in opposing Article 331?" (J.A. 23) was taken from the jury after Carlon conceded that there was no question that Allied had genuinely attempted to influence the NFPA (Tr. 2231-32).

The jury's other findings were that Allied's conduct was "a substantial or material factor in excluding Article 331 from the 1981 NEC" (J.A. 24), "subvert[ed] the consensus standard making process of the NFPA" (*id.*), did not "constitute the least restrictive means of effectively expressing Allied's opposition to the use of ENMT in the marketplace" (J.A. 25), "adversely impact[ed] competition" (*id.*), and "constitute[d] an unreasonable restraint of trade in violation of the antitrust laws" (*id.*).

B. *The Calculation of Damages*

After the verdict on liability, the trial resumed on the issue of money damages. Carlon's opening in this second and discrete phase of the trial sounded an added theme that had not appeared during the weeks of trial on liability: Money damages were now claimed by Carlon not only because Article 331 had been defeated in the NEC and thus in local statutes, but also because Allied had "been using the defeat . . . as a marketing tool" (Tr. 2294-95).

Allied's counsel objected immediately (*id.*):

> MR. WRIGHT [counsel for Allied]: If your Honor please, that's not part of this case. There is no claim in this case that what Allied did after May of 1980 is in any sense illegal. . . .
>
> THE COURT: No, I don't think there is any claim it is illegal, but I think the argument is to the extent at which it impacts upon your damages.
>
> Isn't that your argument?
>
> MR. SACKS [counsel for Carlon]: Yes.

After further colloquy, counsel for Carlon stated that the discrete damages claim it now raised "ha[d] no *Noerr* implications" (Tr. 2313). The trial judge then ruled that Carlon would be permitted to introduce evidence of post-May 1980 activities which "marketed the defeat" before the NEC, noting that "damages can be based only upon conduct which is legal if that

conduct tends to exacerbate the consequences of an illegal conduct" (Tr. 2319).

Carlon's specific evidence to support its claim that Allied "marketed the defeat" was negligible and consisted largely of evidence that Allied sought to organize public support for legislation concerning toxicity (Tr. 2951, 2981-83, 2991-92, 3186-88).

The jury awarded Carlon $3.8 million, to be trebled, plus attorneys' fees (A. 4740).

III. The Judgment Notwithstanding the Verdict

Allied moved to set aside the verdict primarily on the ground that its conduct in connection with the 1981 NEC was protected from antitrust liability under the *Noerr-Pennington* doctrine.

During argument on the post-trial motion, Carlon claimed for the first time that *Noerr-Pennington* was not controlling because its damages flowed not from its exclusion from the NEC and statutes but from Allied's "marketing" of the NFPA's rejection of Article 331. In a lengthy colloquy (Tr. June 27, 1986 at 41-46), the court rejected that argument as a "distortion" ("[t]hat is not the case I remember trying," *id.* at 43) and concluded (*id.* at 44):

> The computation of damages is one thing and causation is another. I don't think you ever retreated from your notion that your damages were caused by the nonadoption of your product by the state legislature.

The district court granted Allied's motion, holding that the *Noerr-Pennington* doctrine applies to conduct outside the legislative halls and is not limited to direct acts of petitioning the government. The court observed that Allied's activity within the NFPA was closer to the legislative process than the public relations campaign protected in *Noerr*. The code adopted by the NFPA, the court noted, "will almost inescapably be followed by the legislatures of the various states. . . . [T]he

decision of the NFPA will be largely determinative of what the legislatures do" (Pet. App. 25a-26a).

The district court rejected Carlon's argument that Allied's conduct was so "reprehensible" and "outrageous" as to lose *Noerr-Pennington* protection. That activity was held to be "so much a part of the traditional democratic process at every level of our society, from the local club right through the Congress itself," that it could not be deemed to be "so outrageous in and of itself so as to be unprotected" (Pet. App. 26a-27a). Carlon had the "same opportunity to advocate its position before the NFPA" and "clearly [was] not excluded from that process in any way" (Pet. App. 30a).

The district court also found "absolutely no basis to apply the sham exception to the Noerr-Pennington doctrine [as there was] a genuine attempt to influence a legislative body arising out of a genuine concern for safety, and, concededly, a factual basis for that concern" (Pet. App. 28a).

Finally, the district court found that Carlon's injury, according to its own theory of the case, flowed solely from the action of state legislatures in enacting the NEC, which excluded ENMT (Pet. App. 29a-30a, 31a-32a).

IV. The Court of Appeals Decision

As primary grounds for reversal, the court of appeals held *Noerr-Pennington* inapplicable to activities within a private code-making body like the NFPA notwithstanding that the goal of these activities is adoption of the NEC as legislation throughout the nation. In so holding, the court acknowledged, it disagreed with three district courts elsewhere as well as Judge Sprizzo in this case (Pet. App. 12a).

The court of appeals found a vital distinction between "the submission of a group's recommendations to the government," which it deemed to be protected conduct, and "the antecedent conduct which generated those recommendations," which is not protected (*id.* at 17a). In a footnote, the court recognized that under *Parker v. Brown*, 317 U.S. 341 (1943), Carlon could not recover "for any injury arising from the adoption of the

NEC by the various governments" (*id.* at 9a n.3). It concluded, however, that Allied's conduct had "caused independent antitrust injury to Carlon"—that is, injury apart from the exclusion by state legislatures—which "should not be excused merely because its actions also indirectly influenced state and local governments" (*id.* at 17a).

INTRODUCTION AND SUMMARY OF ARGUMENT

The court of appeals held in this case that lobbying to influence the content of a model electrical code relied upon and adopted by most states and municipalities violated the Sherman Act and warranted a judgment for treble damages. The decision is at war with this Court's long-settled holding that "no violation of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws." *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1961).

The conduct of Allied challenged in this case was not price-fixing. It was not a group boycott. It was not the use of market power at all. Allied was sued only because it successfully marshalled *political* power, acting within the NFPA's rules to lobby and "get out the vote" in the NFPA code-making process. Its objective was to deny legislative sanction to a product that it genuinely believed to be unsafe, relying on independent scientific evidence. Respondent had a full and fair opportunity to mount a campaign of its own and now seeks indemnity in the antitrust laws for its political defeat. The antitrust laws have no application to this kind of attempt to influence the legislative process.

I. On the main issue, the Second Circuit's broad decision that *Noerr-Pennington* has no application here rests upon two patent misconceptions: first, that this Court's decision in *Noerr* does not protect lobbying activities that are meant to influence legislation only "indirectly"; second, that Allied's lobbying tactics were somehow fundamentally different from those of the *Noerr* defendants because a jury had labeled them

"subversive". *Noerr* itself dealt with lobbying activities that were more indirect—more remote from the operative legislative forum and from the lobbyists' specific legislative goals—and more aggressive, indeed more unethical, than Allied's conduct. The Second Circuit simply misreads *Noerr* and has erred in its conclusion that Allied's indirect lobbying of state and local governments through the NFPA code-making process and its aggressive tactics rendered the *Noerr* doctrine wholly inapplicable.

The notion that Allied should be punished under the Sherman Act for "subversion" of the NFPA's meeting process gives juries an intolerably vague power to regulate associational conduct, misconceives the nature of this political activity, and stretches antitrust prohibitions beyond permissible limits. Allied violated no rules. It deceived no one. It acted in the public interest as well as its self-interest, seeking to deny legislative sanction for a product that it, as well as many disinterested and authoritative experts, believed to be dangerous to public health and safety. There was nothing in this approaching the "vicious, corrupt, and fraudulent" actions found in *Noerr* to be shielded against Sherman Act attack.

In its actions in the NFPA, Allied was exercising its First Amendment rights of association, speech, and petitioning of government. The decision below misapprehends the basic character of this activity, and in the process threatens to impair the crucial role of private code-making bodies in the modern legislative process. State and local governments, which have limited resources and expertise, rely heavily upon model codes drafted by such organizations. The possibility of treble-damage antitrust liability will chill participation in code-making, interfering with the First Amendment rights of industry participants and depriving the states of the benefits of robust and wide-open debate in the formulation of model codes.

Seemingly not reached below, but fallacious in any case, was Carlon's argument that Allied's actions are within the *Noerr* exception for "sham" campaigns to influence legislation. There was nothing "sham" about these actions. Indeed, Carlon explicitly abandoned any pretended issue as to the genuineness

of Allied's pursuit of legislation. It was the very success of this pursuit that led to Carlon's lawsuit seeking Sherman Act damages for the legislative exclusion of ENMT.

II. That Carlon in fact sought damages from Allied for injuries caused by legislative enactments leads to the cognate barrier of *Parker v. Brown*, 317 U.S. 341 (1943). The only theory in the liability portion of this case was that Carlon was harmed by the adoption of the NEC by various state and local governments. Liability on this ground is foreclosed by *Parker*, which insulates such state action from the Sherman Act. Carlon's alternate theory, raised for the first time after the liability phase of the trial, would hold Allied liable for "marketing" the "stigma" of Carlon's NFPA defeat. But that tenuous afterthought, with no substantial support in the record, is also barred by *Noerr*, which denies damages for incidental injuries arguably suffered directly by a plaintiff from activities aimed primarily at legislative measures.

III. Quite apart from the *Noerr* doctrine, to hold Allied liable under the Sherman Act for its dissemination of truthful information about the toxicity problems inherent in Carlon's product—the only damage that Carlon now claims to have suffered—would be an unsound and unprecedented extension of the rule of reason. If anything, the dissemination of such truthful information about a product serves consumer welfare, enhances efficiency, and is fundamentally procompetitive. To punish such activity would turn the Sherman Act on its head and vitiate rights of expression protected by the First Amendment.

ARGUMENT

I.

ALLIED'S ACTIONS AIMED AT LEGISLATION EXCLUDING CARLON'S PRODUCT FROM STATE AND MUNICIPAL CODES ARE PROTECTED AGAINST SHERMAN ACT LIABILITY BY THE *NOERR-PENNINGTON* DOCTRINE

The decision below rejects sweepingly, and without regard to the specific tactics used by Allied at the May 1980 meeting, the proposition that *Noerr-Pennington* "protects attempts to influence a private standard-setting organization where, as here, governments routinely incorporate that organization's standards into their legal codes" (Pet. App. 3a). The primary issue before the Court is whether the court of appeals erred in holding *Noerr-Pennington* protections inapplicable to such attempts, aimed in this indirect but effective fashion at influencing legislation. This issue is separate from the narrow and, in our submission, relatively simple question whether Allied's lawful but assertedly "subversive" actions at the NFPA meeting trigger the so-called "sham" exception to *Noerr-Pennington*.

The Second Circuit's opinion obscures this critical distinction at one point by declaring that "Allied's conduct did not constitute petitioning of the government within the meaning of *Noerr-Pennington*; rather, its conduct was a subversion of the legitimate purposes of NFPA" (Pet. App. 17a). The Ninth Circuit has noted that this language improperly "conflate[s]" the two separate issues presented by the case. *Sessions Tank Liners, Inc. v. Joor Mfg., Inc.*, 827 F.2d 458, 465 (9th Cir. 1987).

The remainder of the opinion below nevertheless reflects that the Second Circuit's holding is broad and not dependent upon any particular findings about Allied's tactics. The court states without qualification that it "decline[s] Allied's invitation to extend *Noerr-Pennington* immunity to lobbying activi-

ties directed toward a 'quasi-legislative' body such as the NFPA" (Pet. App. 12a) and proceeds to elaborate the reasons for that declination (*id.* at 12a-17a). In this light, and in agreement with the analysis of the Ninth Circuit, we argue first, on the threshold question, that *Noerr-Pennington* does immunize Allied's pursuit of legislation through a private code-making organization. We then show that Allied's attempts to influence legislation do not implicate the so-called "sham" exception.

A. The Second Circuit Misconceived the Basic Rationale and Scope of the *Noerr* Doctrine in Holding that Antitrust Liability May Attach for Allied's Political Conduct

The Second Circuit's rejection of *Noerr-Pennington* protection for lobbying directed at quasi-legislative code-making bodies is predicated on an erroneously constricted reading of the doctrine and a series of unsound distinctions. The decision is in conflict with every other court that has addressed the question, including, most recently, the Ninth Circuit. *See Se ns*, 827 F.2d at 465-66. It misconceives the explicit rulings in *Noerr* as well as the fundamental principles underlying that decision and its progeny.

The court's approach is skewed from the outset by its premise that the *Noerr-Pennington* doctrine is an "exemption" from the antitrust laws and therefore must be construed narrowly. The *Noerr* opinion made clear that its holding was based not upon an exemption but upon an understanding that the Sherman Act was never meant in the first place to reach efforts, like the ones here, to affect legislation. 365 U.S. at 137-38. *See also* Point III, *infra*. This Court was mindful of the constitutional doubts that would arise from a contrary view. "The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." *Id.* at 138. *See also California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11, 515 (1972).

Other authorities have recognized that *Noerr-Pennington* is a doctrine of construction to be read generously, not an exemption for conduct that otherwise would be within the reach of the antitrust laws. *See* Handler & De Sevo, *The Noerr-Pennington Doctrine and Its Sham Exception*, 6 Cardozo L. Rev. 1, 5 (1984) (hereinafter cited as *Handler*). *See also In re Airport Car Rental Antitrust Litig.*, 521 F. Supp. 568, 575 (N.D. Cal. 1981), *aff'd*, 693 F.2d 84 (9th Cir. 1982). The Second Circuit's misconception on this aspect explains in part its cramped reading of *Noerr-Pennington*.

1. *The* Noerr-Pennington *Doctrine Protects from Antitrust Liability All Genuine Attempts to Influence Governmental Actions*

The "*Noerr-Pennington* doctrine" refers to the trilogy of cases[7] in which the Court held that activities attempting to influence governmental processes are outside the reach of the federal antitrust laws. *Noerr* itself dealt with a "life or death" political battle between trucking and railroad interests over government regulation of the long-distance freight hauling business. 365 U.S. at 128-29. The parties had engaged in a "vicious, corrupt, and fraudulent" campaign that included deceptive efforts to influence public opinion and, through it, legislation. *Id.* at 129. The railroads were accused, *inter alia*, of using the so-called third-party technique, in which propaganda material prepared for and financed by the railroads was made to appear as the spontaneous commentary of disinterested civic groups. *Id.* at 130.

The Court held unanimously that such indirect lobbying was beyond the reach of the Sherman Act, even where its "sole purpose" was to destroy the truckers as competitors, *id.* at 138, and even where "unethical" tactics were employed, *id.* at 141. The Court said that the Sherman Act "condemns trade re-

7 *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

straints, not political activity," *id.* at 140-41, and concluded that where parties "were making a genuine effort to influence legislation and law enforcement practices," and were not engaging in a "mere sham" to cover direct interference with the business relationships of competitors, antitrust liability could not attach, *id.* at 144.

The Court identified two major grounds for its holding. First, *id.* at 136, that the publicity campaign under consideration

> [bore] little if any resemblance to the combinations normally held violative of the Sherman Act, combinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom, or help one another to take away the trade freedom of others through the use of such devices as price-fixing agreements, boycotts, market-division agreements, and other similar arrangements.

This rationale has less to do with the governmental target of lobbying activities than with the nature of the activities themselves; acts of political persuasion do not resemble agreements in restraint of trade.

The second basis for the holding in *Noerr* was the Court's conclusion that imposing antitrust liability on speech and conduct in an economic legislative battle would threaten the right of free speech and the right to petition government embodied in the First Amendment. Starting with the premise that "where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out," *id.* at 136, the Court went on to reason that protecting indirect lobbying was necessary to protect "the power of government to take actions through its legislature and executive that operate to restrain trade," *id.* at 137. The Court continued:

> In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends

> upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act.

Id. Thus, "indirect" no less than "direct" attempts to lobby the legislature must be deemed beyond the reach of the Sherman Act. *Id.* at 137-41.

In *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), the Court extended *Noerr* to attempts to influence the executive branch. The principles of *Noerr* were there applied to protect efforts by mine owners and union officials to squeeze out small coal producers by pressing the Secretary of Labor to raise minimum wage levels. The Court held that "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." *Id.* at 670. Finally, in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), the Court extended *Noerr* to administrative and adjudicative proceedings, making clear that the doctrine was firmly rooted in the First Amendment. *Id.* at 510-12.

The *Noerr-Pennington* doctrine is a logical adjunct to the holding of *Parker v. Brown*, 317 U.S. 341 (1943), that the Sherman Act does not apply to governmental action that results in a restraint of trade. The Court found "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." *Id.* at 350-51.

The Court recently extended the *Parker* doctrine to apply to action taken by "committees, commissions, or others who necessarily must advise the sovereign," because any other holding "would emasculate the *Parker v. Brown* doctrine." *Hoover v. Ronwin*, 466 U.S. 558, 580 (1984). *Noerr-Pennington* builds upon this concern by providing further

protection for speech aimed at influencing governmental action.

Such protection can be seen as necessary to preserve the flow of information to government and hence to protect the power to act under *Parker*. But the doctrine can also be seen as a recognition that when private parties have persuaded a government to act in a certain way, "the government's decision to act reflects an independent governmental choice, constituting a supervening 'cause' that breaks the link between the private party's request and the plaintiff's injury." P. Areeda & D. Turner, *Antitrust Law*, ¶ 201, at 4 (Supp. 1986) (hereinafter cited as *Antitrust Law*). *See also Airport Car Rental Litig.*, 521 F. Supp. at 574 (where defendants try to influence airport authorities to exclude plaintiff from the on-airport market, any restraint flows only from the action of airport authorities).

Every federal court that has addressed the question, except the Second Circuit in this case, has held that the *Noerr-Pennington* doctrine applies to efforts to lobby a private code-making body where the ultimate goal is to influence state legislatures that will rely upon the final code. This application is necessary to protect both the right to petition government and the values of participatory democracy underlying *Noerr-Pennington*.

Most recently, the Ninth Circuit found that *Noerr-Pennington* applied on facts remarkably similar to those in the present case. In the *Sessions* case, Joor, a manufacturer of new metal tanks, successfully lobbied the Western Fire Chiefs Association ("WFCA") to exclude from the Uniform Fire Code ("UFC") a process of repairing old tanks employed by Sessions, a competitor. The WFCA, like the NFPA, is a non-profit, voluntary private membership organization with no governmental status. The UFC, which it promulgates, has no legal effect until it is adopted by state and local governments. 827 F.2d at 460-61. For *Noerr* purposes, therefore, the organization and its code were identical to those in the present case.

The lobbying conducted in *Sessions* was, if anything, more aggressive than that of Allied in this case. Joor's president became a member of the WFCA subcommittee considering the

question, giving him special power over the proposal denied to Sessions. In addition, under allegations taken as true for summary judgment purposes, Joor misrepresented critical facts in its presentation to WFCA and in effect bribed various fire chiefs who were influential in the code-making process. *Id.* at 461.

The Ninth Circuit nevertheless decided that this conduct was covered by *Noerr-Pennington*, and emphasized three grounds for its holding that the doctrine "immunizes proper lobbying—either singly or in combination with others—of a private association engaged in promulgating an important model code to influence legislative and executive decisions."[8] *Id.* at 462. First, the court relied upon the right to petition, which "is not confined to entreating the government directly for relief." *Id.* The court stressed that *Noerr* itself had concerned indirect pressure on the legislature through the manipulation of public opinion. Second, the court noted the importance of code-making organizations in the political process, and the concomitant need to protect the free flow of information to bodies upon which government actors rely. Finally, the court referred to *Noerr*'s narrowing construction of the Sherman Act: "The Sherman Act was not intended to make private parties liable, in the ordinary case, for government acts." *Id.* at 464. In this connection, the court stressed the "proximate cause" aspect of *Noerr-Pennington*, noting that there was no harm to plaintiff until the UFC was adopted by local governments. *Id.*

The *Sessions* court also strongly criticized the holding of the court of appeals in the present case. Noting that the Second Circuit had confused the question of *Noerr-Pennington*'s application with the "sham" inquiry, the court observed that the Second Circuit

8 The court held that Sessions had stated "a limited 'sham' exception claim" only to the extent that Joor was alleged to have made misrepresentations to fire officials acting in an administrative capacity, and remanded for further proceedings on that claim. 827 F.2d at 468. The court noted in this connection that similar misrepresentations in the legislative context would not be actionable under *Noerr-Pennington*. *Id.*

> made no mention at all of [antitrust defendants'] associational rights, which are plainly implicated. More troubling still, the court held that defendant could not try to justify the organization's failure to approve plaintiff's product (which formed the basis of the lawsuit) by showing that plaintiff's product was in fact unsafe. . . . Thus *Indian Head* in effect suggests that defendants may owe treble damages simply for bringing forward undisputed evidence that a rival's product is actually hazardous. The *Noerr* doctrine exists precisely to prohibit such a result.

Id. at 466 n.6.[9] The two district courts in other circuits that have addressed the issue are in accord with the Ninth Circuit.[10]

In support of its contrary position, the Second Circuit found significance in two factors: First, the court held that *Noerr* did not apply because of the NFPA's private status, rendering

9 The *Sessions* court suggested that the Second Circuit could have reached the same result by applying the "sham" exception to *Noerr-Pennington*. As we demonstrate below, *see* pp. 36-38, *infra*, the Ninth Circuit's comment in this connection gives too broad an application to the "sham" exception, and evidently misreads the record in the present case.

10 In *Wheeling-Pittsburgh Steel Corp. v. Allied Tube & Conduit Corp.*, 573 F. Supp. 833 (N.D. Ill. 1983), the court held that *Noerr-Pennington* applied to the same NEC amendment process at issue in this case. The court held that it was irrelevant that the NFPA was not itself a government agency, stressing that "the key factor is the nature of the relationship between the trade association and the governmental bodies." *Id.* at 839. Because of the "great delegation of authority to the NFPA" by local governments throughout the country, lobbying efforts within the organization are protected by the doctrine. *Id.* at 839-40.

Similarly, in *Rush-Hampton Industries, Inc. v. Home Ventilating Institute*, 419 F. Supp. 19 (M.D. Fla. 1976), the court applied *Noerr-Pennington* to lobbying conducted by a trade association before regional organizations that promulgate model building codes and building standards relied upon by state and local entities. The court observed that "approval by one of these organizations is 'tantamount to approval by numerous governmental entities' in its respective region, as the standards and products approved are often adopted by reference from those standards and products already reviewed by the organization." *Id.* at 22-23.

"indirect" Allied's efforts to influence legislation. Second, the court stressed a question-begging conclusion that Allied had an improper motive, its "sole purpose" being to achieve an anticompetitive result through "subver[sive]" means (Pet. App. 21a). Both thoughts are in conflict with *Noerr* itself and with the underlying values of the *Noerr-Pennington* doctrine.

2. *Neither the Private Character of the NFPA nor the "Indirect" Nature of Allied's Lobbying Sustains a Meaningful Distinction of* Noerr-Pennington

In finding Allied's petitioning to be too indirect and remote from the legislative process to be protected, the Second Circuit placed great weight on its distinction between the legislature itself, which "acts in the public interest," and a private organization, whose "agenda often will not coincide with, and may be directly contrary to, the interests of the broader public" (Pet. App. 13a-14a). However, the *Noerr-Pennington* doctrine has never, from the outset, been limited to direct petitioning of government. In *Noerr* itself the petitioning was less direct than in the present case: The public relations campaign there was aimed at the general public, in the hope that public opinion would eventually filter back to Congress. 365 U.S. at 131. In this case, Allied's lobbying efforts were more narrowly focused on the specific body, the NFPA, whose decision would directly influence the actions of local governments. In both cases, private parties were the immediate targets of the lobbying activity; the effect on government actors was in both cases "indirect."

The Second Circuit acknowledged this difficulty when it noted Allied's contention that *Noerr* "authoritatively abolishes any distinction between 'direct' and 'indirect' petitioning" (Pet. App. 19a). The court never really faced the question, however, merely declaring that unlike the railroads in *Noerr*, "Allied cannot similarly claim that its conduct constituted 'political activity' conducted within the 'political arena' " (*id*).

But that is precisely Allied's claim. In its activities within the NFPA, Allied engaged in the kind of political conduct that *Noerr* protects. It was attempting to influence a private group

whose decision would and undisputedly did have direct and decisive influence upon state and local governments. Allied's actions, whatever its motives and whatever tactics it employed, were political advocacy, not the abuse of market power in restraint of trade. What it sought, and achieved, was a particular legislative result.

The key question is not whether the petitioning activity is direct or indirect; it is whether a party is genuinely petitioning at all—whether the party's actions are indeed meant to influence ensuing legislation. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 914 (1982); *see also Federal Prescription Serv., Inc. v. American Pharmaceutical Ass'n*, 471 F. Supp. 126, 130 (D.D.C. 1979), *aff'd*, 663 F.2d 253 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 928 (1982). Here, of course, there was never any question that Allied's political activity in the NFPA was aimed at achieving a legislatively mandated exclusion of Carlon's product from the market. Carlon's essential complaint was that Allied succeeded.

The distinction drawn by the court of appeals between direct and indirect influence upon legislation is neither realistic in fact nor sound in law. The record makes clear that the effective route to Allied's goal was via the NFPA. In the words of the opinion below, the NEC is "the most widely disseminated and adopted model code in the world" (Pet. App. 4a). Efforts directly to lobby local governments, which lack the resources to study closely or second-guess the recommendations of the NFPA, would be largely futile. The NEC is adopted with few or no changes by the vast majority of states and a host of municipalities. As the district court found, parties seeking to be heard with respect to the NEC must join the political process at the NFPA (Pet. App. 25a.-26a).[11] The road to Albany, Phoenix and Sacramento begins at the NFPA. That Allied might have chosen the tardy and less effective course of lobbying directly the various legislative bodies that enacted the

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11 *Accord Wheeling-Pittsburgh Steel Corp. v. Allied Tube & Conduit Corp.*, 573 F. Supp. 833, 838 (N.D. Ill. 1983).

NEC—an alternative the court of appeals deems the only protected one—is at best irrelevant under *Noerr*.

In support of the proposition that only direct petitions to government and not antecedent acts are protected (Pet. App. 17a), the court cited a string of inapposite cases, each of which dealt with price-fixing agreements, group boycotts, or some other direct action in restraint of trade undertaken by groups of private market participants. These cases stand only for the proposition that such agreements in restraint of trade do not become protected simply because they may eventually be reviewed or ratified by a government agency.[12]

Feminist Women's Health Center, Inc. v. Mohammad, 586 F.2d 530 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979), upon which the Second Circuit placed special reliance, is notably beside the point. In that case, the Fifth Circuit held that the collective effort of a private group of doctors to discourage professional affiliation with a private abortion clinic was not protected by *Noerr-Pennington* except to the extent that the doctors had actually petitioned the Florida Board of Medical Examiners, a state-created entity. *Id.* at 542-43. The court did not reject the theory upon which *Noerr-Pennington* protects Allied here. It simply held that neither the OB-GYN staffs of private hospitals nor a private medical association that had also been "petition[ed]" were sufficiently related to a government body to invoke *Noerr*, and that the doctors therefore were not engaged in petitioning government at all, directly or indirectly. *Id.* at 543-45. The harm in *Mohammad* flowed from the actions of the private organization, with no significant restraint being caused by any governmental body. *Id.* at 535-39.[13]

12 *See, e.g., United States v. Southern Motor Carriers Rate Conference, Inc.*, 702 F.2d 532 (5th Cir. 1983) (private agreements to fix rates), *reaffirming en banc* 672 F.2d 469 (5th Cir. 1982), *rev'd on other grounds*, 471 U S. 48 (1985); *Litton Systems, Inc. v. American Telephone & Telegraph Co.*, 700 F.2d 785 (2d Cir. 1983) (imposition of private tariffs and the requirement of an unnecessary interface device), *cert. denied*, 464 U.S. 1073 (1984); *Feminist Women's Health Center, Inc. v. Mohammad*, 586 F.2d 530 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979).

3. *The Second Circuit Improperly Based Its Holding in Large Part on the Jury's Nebulous "Subversion" Finding*

The court of appeals appears to have arrived at its categorical holding against *Noerr* protection primarily on its assumption that Allied's motivation was solely to restrain trade and that it did so through "subversion" of the NFPA's rule-making process. "[W]e conclude that Allied's 'ballot stuffing'—a subversion of the NFPA code-making process—should not be deemed governmental petitioning" (Pet. App. 12a). In so holding, the Court confused the primary question before it, whether *Noerr-Pennington* applied at all, with the second, narrower question, whether the "sham" exception was triggered on the specific facts of this case. *Sessions*, 827 F.2d at 465. The court also failed to consider the unacceptable vagueness, approaching meaninglessness, of the subversion finding.

There was no instruction to the jury as to what "subversion" could—or could not—mean in this setting. Whatever "subversion" meant, the jury was allowed to find it while explicitly determining that (1) Allied did not violate any of the rules or regulations of the NFPA in pursuing its genuine belief that ENMT was unsafe; (2) the NFPA rules and regulations were fair in that they provided a full and effective appeal from the vote of the membership; and (3) Allied's conduct did not deprive Carlon of full and effective access to the NFPA (J.A. 23-24).

Allied's "packing" of the NFPA meeting, the presumptive basis for the jury's finding of "subversion," is irrelevant to the question whether *Noerr* applies to lobbying an agency like the NFPA. It makes no difference under *Noerr* or for Sherman Act purposes generally that the jury accepted the invitation to

13 *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982), also cited by the court below, in no way supports the Second Circuit's holding. As the district court noted, the *Noerr-Pennington* doctrine was never even raised in *Hydrolevel* (Pet. App. 29a).

find that Allied's conduct at the May 20 meeting "subverted" the NFPA process. There was no tenable meaning on which the jury could have been permitted to transmute Allied's admittedly crude tactic, found by the jury to be in conformity with the NFPA rules and equally available to Carlon, into a Sherman Act violation.

On the contrary, to fashion sanctions on such a theory moves unacceptably toward restricting on grounds of taste or caprice "the practice of persons sharing common views banding together to achieve a common end"—a practice "deeply embedded in the American political process." *Citizens Against Rent Control/Coalition For Fair Housing v. City of Berkeley*, 454 U.S. 290, 294 (1981).[14]

The Court's opinion in *Noerr* is again instructive. It expressly rejected the argument that the railroads' attempts indirectly to influence the legislature were unprotected because they employed dishonest or unethical tactics. 365 U.S. at 140. Even a campaign that was " 'vicious, corrupt, and fraudulent' " was deemed protected. *Id.* at 129. As the Court ruled, dishonest tactics, including outright misrepresentations, are not grounds for punishing lobbying activity under the Sherman Act. *See Antitrust Law*, ¶ 204.1c, at 45-46 (Supp. 1986); *Handler* at 18.[15]

This Court in *Noerr* rejected a far stronger variant of the "subversion" argument adopted by the court of appeals in this case. The railroads in *Noerr* used the so-called third-party

14 As the cited case reminds us, limiting how much people may give or what they may do to bring their associations to support their interests is a highly sensitive subject under the First Amendment, quite without regard to special doctrines like *Noerr-Pennington*. Even if some people were brought to support associational goals by "intimidation" or "threats," this could not be a ground of proximately caused damages and recovery consistent with the rights assured by the First Amendment. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 921-22 (1982).

15 *See also Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220, 228 (7th Cir. 1975) ("When concerted activities occur in a legislative or other non-adjudicatory governmental setting, they are not within the Sherman Act even though they include 'conduct that can be termed unethical,' such as deception and misrepresentation." (citation omitted)).

technique, in which publicity material prepared for the railroads was circulated as if it had been generated spontaneously by citizens and civic groups. 365 U.S. at 129-30. Members of the public, through whom the railroads hoped to influence the legislature, were thereby deceived into thinking that the anti-trucking arguments had come from objective third parties. As vigorously argued in the brief for the trucking interests in *Noerr*, the railroads "worked behind the scenes with government officials, succeeding even in getting their statistics, loaded against the trucking industry, before the Governor of Pennsylvania and his Secretary of Highways, in the guise of a report of the assistant chief engineer of the Department of Highways." Brief for Respondents at 15-16, *Noerr* (No. 60-50). Furthermore, the railroads "engaged in active deception and fraud, *misrepresenting* themselves as the Grange, the Township Supervisors, automobile clubs, and even the Bureau of Public Roads of the State of Ohio." *Id.* at 20 (emphasis in original). The brief concluded: "Far from being privileged, petitioners' technique to procure legislation by misrepresentation of their true connection, has been held to be against public policy and illegal." *Id.* at 21-22.

This Court agreed that the third-party technique used by the railroads fell "far short of the ethical standards generally approved in this country." *Noerr*, 365 U.S. at 140. Clearly, a jury might well have found the railroads' campaign "subversive" of democratic processes in ways far more fundamental than Allied's get-out-the-vote campaign. Nevertheless, the Court rejected the truckers' argument, noting that the Sherman Act does not establish a general code of business ethics:

> Insofar as that Act sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity. . . . The proscriptions of the Act, tailored as they are for the business world, are not at all appropriate for application in the political arena. Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities, a caution which has been reflected in the decisions of this

> Court interpreting such legislation. All of this caution would go for naught if we permitted an extension of the Sherman Act to regulate activities of that nature simply because those activities have a commercial impact and involve conduct that can be termed unethical.

Id. at 140-41 (footnote omitted). The reasoning there, rejecting Sherman Act liability for political "conduct that can be termed unethical," applies with at least equal force to lawful conduct that a jury instructed in vague terms found appropriate to label "subversive."[16]

The constitutional component of the *Noerr-Pennington* doctrine protecting the people's right to petition, *id.* at 139, excludes from this setting vague notions of "ethics" or propriety in the lobbying process. That is not to say there is no basis for the Second Circuit's concern about potential abuse of that process. Whenever vigorous advocacy is permitted, the possibility of distortion and unfairness exists. Parties with a pecuniary interest in a particular issue have a motive to skew the debate in their direction. But, as *Noerr* tells us, these are risks that must be borne in an open and democratic society. *Id.* Certainly, if there is to be regulation of the lobbying process, it ought not to be through imposition of treble-damage Sherman Act liability on the basis of a jury's sense of appropriate etiquette in the political arena as measured by some hazy subversion standard. Jurors, like judges, are without such power; as is true for joint venturers and code-making groups alike, "the antitrust laws do not themselves impose . . . a requirement of process." *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 293 (1985).

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16 In addition, the Second Circuit's statement that Allied's "sole purpose" in lobbying the NFPA was "achieving an anti-competitive result" (Pet. App. 21a) is both legally irrelevant and factually incorrect. *Noerr* itself stressed that pecuniary motivation does not make lobbying activity a Sherman Act violation, since people with "a hope of personal advantage . . . provide much of the information upon which governments must act." 365 U.S. at 139. And the jury in this case specifically found that Allied acted at least in part upon its genuine belief that ENMT was unsafe (J.A. 24).

B. The Decision Below Would Stifle Uninhibited Debate in the Model Code Process And Would Interfere With Useful And Desirable Code-Making Activity

The opinion below severely undervalues the role of code-making bodies in the political process, and wrongly ignores the chilling effect that imposing liability in these circumstances will have on code-making activities. Private standard-setting bodies have assumed an increasingly important role in the legislative process through the promulgation of model codes. The parties who have the most to contribute to this process—members of the affected industries—are often those with significant degrees of self-interest. If these parties are not protected in their efforts vigorously to influence the code-making process, their involvement will be curtailed or entirely deterred by the prospect of treble-damage liability.[17]

The important role of organized interest groups in American politics has been recognized from our earliest history. More than 150 years ago, Alexis de Tocqueville observed:

> As soon as several of the inhabitants of the United States have taken up an opinion or a feeling which they wish to promote in the world, they look out for mutual assistance; and as soon as they have found one another out, they combine. From that moment they are no longer isolated men, but a power seen from afar, whose actions serve for an example and whose language is listened to.

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17 Professor Handler is in accord:

> As the Supreme Court recently reminded us, our form of government is predicated on the pluralistic belief that the people will act according to their own self-interest and that "the summation of these individual pursuits will further the collective welfare." In this day of interest-group politics, it is essential that the right to petition to the legislative, executive, administrative, and judicial arms of the government be zealously safeguarded.

Handler at 55 (citation omitted).

2 *Democracy in America* 117-18 (P. Bradley rev. ed. 1945). Tocqueville recognized that "[i]n the United States associations are established to promote the public safety, commerce, industry, morality, and religion. There is no end which the human will despairs of attaining through the combined power of individuals united into a society." 1 *id.* at 199.

One of the primary purposes for which Americans form associations is to influence the passage of laws, as this Court recognized in *Noerr*, 365 U.S. at 139. This Court also found that interest groups use a variety of direct and indirect methods to achieve this purpose. The railroads' campaign to influence Congress embraced not just direct lobbying but also "[c]irculars, speeches, newspaper articles, editorials, magazine articles, [and] memoranda." 365 U.S. at 142.

In the years since *Noerr*, the importance of indirect methods of lobbying has grown. Political scientists have observed the development of the "grass roots" technique of lobbying, which uses a variety of methods to generate public pressure for or against legislation. As one scholar has noted:

> Lobbying at the grass roots assumes that legislators are particularly responsive to public opinion. Direct lobbying becomes much more effective when it is supported by an articulate public. Without it . . . direct lobbying—the personal contacting of legislators by lobbyists—tends to be ineffective except on narrow issues.

A. Holtzman, *Interest Groups and Lobbying* 100 (1966). The techniques of indirect grass roots lobbying include mass letter-writing, public relations and media campaigns, and obtaining testimony and involvement in the lobbying process by non-lobbyist constituents. *Id.* at 101-07. *See also* G. Wilson, *Interest Groups in the United States* 77, 93-95 (1981); S. Levitan & M. Cooper, *Business Lobbies* 5 (1984).

Trade associations and other coalitions serve the crucial role of "interest aggregation"—creating, through internal bargaining and the winnowing of options, a consensus that can be presented to political decision makers. Costain & Costain, *Interest Groups as Policy Aggregators in the Legislative Process*, 14 Polity 249, 258-59 (1981). Given the limited resources and technical expertise available to state legislatures especially, lobbying groups have long been relied upon both to provide information and to draft legislation. *See* R. Weissberg, *Understanding American Government* 250-52 (Alt. ed. 1981); A. Holtzman, *supra*, at 74-75, 90.

In recent years, the role of industry associations in drafting legislation has been formalized in the code-making process. More than 420 private organizations now participate in promulgating some 32,000 codes and standards. *See* National Bureau of Standards, Special Pub. No. 681, *Standards Activities of Organizations in the United States* 1 (Aug. 1984). State and local governments have come to rely heavily upon such codes, particularly in areas involving complex technical or scientific issues. *See* Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 Tex. L. Rev. 1329, 1377-78 (1978). Voluntary standards are often adopted through statutory " 'incorporation by reference.' " *Id.* at 1386. The federal government also has relied upon the private sector in formulating national standards in such areas as occupational safety, water pollution control, and consumer product safety. *See* Bakke, *Joint Efforts in Developing Standards*, 44 Antitrust L.J. 337, 341-42 (1975).

The Ninth Circuit stressed this vital role of private standard-setting bodies when it held in *Sessions*, 827 F.2d at 463-64 (citation omitted), that *Noerr-Pennington* protected participation in the WFCA's code-making activities:

> Municipal and other local lawmakers rely on the WFCA's investigatory work in approving or disapproving myriad products and safety standards. In many instances it would be either impossible or inefficient for each local government to do otherwise. Most localities lack both the required resources and the talent. At the same time, it also would be inefficient if not impossible for particular businesses effectively to lobby every city or county council that adopts a fire code. . . . It follows that the WFCA

renders valuable civic services and that the information it receives is quite important in the legislative process.

Promulgation of the NEC by the NFPA is a prime example of the importance to local governments of model codes. Twenty-five states and the District of Columbia adopt the NEC verbatim by statutory reference. *See, e.g.*, 41 Ill. Admin. Code tit. 100, § 100.210 (1986); Md. Ann. Code art. 38a, § 60 (1982); N.Y. Exec. Law §§ 370-83 (McKinney 1982). Nineteen more adopt it with amendments, changing an average of only 12 of the 114 articles. As the court below recognized, many local governments also rely heavily upon the NEC, making it the most widely disseminated and adopted model code in the world (Pet. App. 4a-5a n.1).[18]

Oddly, because a standard-setting organization " 'wields great power in the Nation's economy,' " the Second Circuit sought to circumscribe Allied's role within the NFPA (Pet. App. 15a) (quoting *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 566, 570 (1982)). But it is precisely this great power that makes crucial full and unshackled participation in the code-making process. Such participation is at minimum another method of indirect lobbying, analogous to the public relations and media campaigns employed by numerous interest groups to influence legislation indirectly. If anything, it is even closer to the legislative process.

The Second Circuit's position may be expected to deter vigorous advocacy in lobbying and, as a consequence, to impoverish the legislative process. Local governments rely upon robust and wide-open debate to produce the draft codes they adopt. If critics do not speak up for fear of treble-damage liability, the code-making process will lose the spirit of give-and-take necessary to produce the best product. The Second Circuit's application of the Sherman Act actually insulates code-making bodies from public industry criticism, rendering

18 *See also Wheeling-Pittsburgh Steel Corp. v. Allied Tube & Conduit Corp.*, 573 F. Supp. 833, 834 (N.D. Ill. 1983).

the ultimate code less, rather than more, representative of industry-wide sentiments.

The importance of protecting full and vigorous participation in the code-making process was recognized by the district court in this case (Pet. App. 25a-26a). That court also expressed a view of the political process perhaps more pragmatic and realistic than that of the Second Circuit. It found Allied's conduct to be an accepted part of "the traditional democratic process at every level of our society, from the local club right through the Congress itself," and therefore declined to find Allied's action to be "so reprehensible and so outrageous" that it was unprotected by *Noerr-Pennington* (Pet. App. 26a-27a).

Lobbying, mobilizing support, "getting out the vote"—these are the tactics inevitably relied upon to influence legislation. Where such conduct is pursued in conformance with an organization's rules, where access and indeed the use of similar tactics is not denied to opponents, and where the forum employed is functionally the only one in which to have a say in influencing legislation, both the letter and the spirit of the *Noerr-Pennington* doctrine require immunity from antitrust liability. As one distinguished commentary has said:

> The minimum teaching of *Noerr* is that unethical political conduct in the legislative context is irrelevant for antitrust purposes. And that result is reinforced by the recognition that government learns about reality through a complex battle of contending political forces which speak truths, and partial truths, and exert diverse pressures upon various persons and institutions. Society recognizes that politics is often a rough and tumble affair. Many would feel, moreover, that definition and balancing are better left to legislatures, which have more political experience than the courts and which may be better able to appreciate the balance of contending forces.

Antitrust Law, ¶ 204, at 46-47 (1978).

C. *Noerr*'s "Sham" Exception Has No Application Where, As Here, A Defendant Seeks Genuinely to Influence Legislation

Though the point appears not to have been reached by the court of appeals, except possibly in its fleeting reference to "subversion" of the NFPA process, Carlon argued below that the facts of this case bring into play the so-called "sham" exception to the *Noerr-Pennington* doctrine. The Ninth Circuit in its *Sessions* opinion has found this to be a basis for reconciling that case with this one. We undertake to demonstrate here that Allied's undisputedly "genuine" efforts (so stipulated and found by the district court, Pet. App. 26a) to influence the NFPA, predicated on a good-faith belief that Carlon's product was dangerous to life, do not constitute anything like the sham conduct to which the exception relates.

This Court first posited a possible "sham" exception in *Noerr*, 365 U.S. at 144 (emphasis added):

> There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified. But this certainly is not the case here. *No one denies that the railroads were making a genuine effort to influence legislation and law enforcement practices.*

The exception was further refined in *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508, 512 (1971). There, the petitioner, a trucking association, was alleged to have "harass[ed] and deter[red]" another trucking association by instituting state and federal proceedings to resist applications by the respondents to secure operating rights. *Id.* at 511. The petitioner " 'instituted the proceedings and actions . . . with or without probable cause, and regardless of the merits of the cases.' " *Id.* at 512. This harassment was alleged to have denied the plaintiffs "free and unlimited access" to these

administrative and judicial proceedings, with the result that the proceedings were "effectively closed" to them. *Id.* at 511. Because the petitioners were not really trying to use the administrative process, but were merely seeking to harass the respondent and deny it access to the process, this Court concluded that the complaint established a basis for applying the "sham" exception.

Taken together, these and later decisions of the lower courts establish that a sham "is the improper invocation of governmental machinery in order to injure a rival by the invocation itself and without expectation of obtaining a favorable governmental decision." *Antitrust Law*, ¶ 203.1c, at 10 (Supp. 1986). Whether there is a sham depends on whether "the efforts to influence legislation, or otherwise to obtain governmental action, were genuine and not a mere cover or camouflage for a concerted program to harm competitors." *Handler* at 8.

When the *Noerr-Pennington* doctrine is invoked in cases involving legislative petitioning, the sham exception will virtually never apply. *Id.* at 18; *Antitrust Law*, ¶ 203.1c, at 11 (Supp. 1986). Professors Areeda and Turner argue that to prevail a plaintiff must demonstrate that the lobbying was conducted without even a slight expectation of achieving the desired legislative result—a condition that will almost never obtain in the real world. Further, if the lobbying indeed stood no chance of success, the plaintiff would have no need to respond, and would not be injured. "Thus, about the only evidence that would demonstrate impropriety would be the speaker's own admission that his lobbying efforts were undertaken in bad faith." *Id.*, ¶ 203a, at 40 (1978).

That analysis is borne out at least in part by the fact that since the sham exception was formulated, only some twenty sham cases have concerned claims based upon petitioning the legislature, and in not one of these has the challenged conduct been found to be a sham. *Handler* at 18.

Carlon has made no showing that would permit the extraordinary application of the sham doctrine to this case. The record and jury findings preclude that. Allied had a genuine belief that ENMT was unsafe and acted at least in part on that

belief in seeking to influence the legislative process by opposing Article 331 within the NFPA (J.A. 23). Moreover, Allied was successful in obtaining the legislative result it sought. That alone is enough. *See Antitrust Law*, ¶ 203a at 10 (Supp. 1986).

On these facts, neither court below found Allied's conduct to be sham.[19] Nor does the "subversion" finding provide a basis for applying the "sham" exception in the legislative lobbying context, any more than did the railroads' unethical conduct in *Noerr*. *See* pp. 27-30, *supra*. The decisive point remains that Allied's aim, which it achieved, was to obtain favorable legislation, and that Allied in no way excluded Carlon from the legislative process.

II.

NOERR AND *PARKER*, READ TOGETHER, BAR THE THEORY OF LIABILITY RELIED UPON BY THE SECOND CIRCUIT

The court of appeals recognized that under the doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), Carlon could seek no redress for any injury arising directly from the adoption of the NEC by various state and local governments (Pet. App. 9a n.3). The court nevertheless imposed liability upon Allied on the basis of "stigma" allegedly suffered by Carlon because of

19 As the district court concluded (Pet. App. 26a):

> There can't be any question that the attempt on the part of Allied to influence the various state legislatures through the NFPA was a genuine attempt to influence legislative action. All of those cases which have found that Noerr-Pennington does not apply involve situations where it was clear that the defendant was not genuinely intending to influence legislative or official action, but was merely indulging in a posture or a sham that was designed solely to effectuate their anticompetitive purpose. Here there is no question that defendant genuinely intended to influence legislative action through the NFPA. That was never in dispute. Moreover, the jury found Allied had a genuine concern for safety and plaintiff has conceded that there is a factual basis for that concern.

ENMT'S exclusion from the 1981 NEC and Allied's "marketing" of that stigma (*id.* at 9a).[20]

The court's holding is supported by neither the record nor the law. Carlon tried its liability case solely on the theory that it had been harmed because the NEC had been adopted by the states. Only after the jury returned a verdict on this theory did Carlon attempt to introduce the "stigma" theory into the case, seeking to avoid the *Parker* and *Noerr* problems inherent in its claim. The district court rejected Carlon's attempt retroactively to establish liability on this new theory; the adoption of the theory by the court of appeals cannot obscure that there is no basis for liability that is not barred by either *Noerr* or *Parker* or both. The two cases confront Carlon with an inescapable dilemma.

A. The Liability Theory Actually Tried Below Is Barred Under *Parker*

The complaint in this case, which was never amended, contains no intimation of the "stigma" theory. Instead, it is based entirely on the theory that Carlon's antitrust injury was proximately caused by the NEC's adoption by state and local governments. Complaint paras. 13, 30-32 (J.A. 7, 13-14). As we have shown, *see* pp. 7-8, 10-11, *supra*, this is the *only* theory for liability that was offered until the June 27, 1986, post-trial hearing, at which Carlon for the first time raised the "stigma" argument in urging the trial court not to apply the *Noerr-Pennington* doctrine. The district judge rejected this new theory as a "distortion" of what had been presented to the jury and plaintiff essentially conceded that the "stigma" theory had been developed only when it became clear that *Noerr* would bar recovery on the original theory (Tr. June 27, 1986 at 42-43).

20 The court of appeals also found that Allied did not challenge "the correctness of" or "the *foundation for*" damages based on the stigma (Pet. App. 9a n.3) (emphasis added). In fact, Allied did object, loudly and clearly, to the introduction of this new, baseless theory, both before the district court (Tr. 2294-95) and before the court of appeals. *See* Brief in the Court of Appeals of Defendant-Appellee-Cross-Appellant at 9-10.

Without laboring the details of the transcript, it is decisive and undisputed that the "stigma" theory was never argued during the *liability* phase of the trial. The only theory underlying the jury's liability verdict was the direct harm caused to Carlon by the adoption of the NEC by various state and local governments. Such liability, however, is clearly barred by the rule of *Parker*, which precludes Sherman Act recovery for trade restraints imposed by legislative enactments.

The *Parker* doctrine has been broadly construed to protect the state's right to restrain trade in exercising its regulatory authority, even when the state acts through nongovernmental parties as its agents. In *Hoover v. Ronwin*, 466 U.S. 558, 580 (1984), this Court rejected reasoning that

> would allow Sherman Act plaintiffs to look behind the actions of state sovereigns and base their claims on perceived conspiracies to restrain trade among the committees, commissions, or others who necessarily must advise the sovereign. Such a holding would emasculate the *Parker v. Brown* doctrine. For example, if a state legislature enacted a law based on studies performed, or advice given, by an advisory committee, the dissent would find the State exempt from Sherman Act liability but not the committee. A party dissatisfied with the new law could circumvent the state-action doctrine by alleging that the committee's advice reflected an undisclosed collective desire to restrain trade without the knowledge of the legislature. The plaintiff certainly would survive a motion to dismiss—or even summary judgment—despite the fact that the suit falls squarely within the class of cases found exempt from Sherman Act liability in *Parker*.

Those conclusions apply *a fortiori* to this case, where the claimed cause of direct injury was legislative action by the states and municipalities, not the "antecedent" actions in and by the NFPA (Pet. App. 17a).

The actions of Allied in the NFPA did not in themselves have any anticompetitive effect. The injury to Carlon, if any, was caused by the adoption of the NEC by various state

legislatures and under *Parker* there can be no antitrust claim for such harm. If Allied's lobbying efforts had been unsuccessful in obtaining state legislation, there would have been no harm to Carlon. *See Antitrust Law*, ¶ 204d, at 49 (1978). Either way, Carlon's theory of liability would fail because Allied did not proximately cause any injury.

B. If There Were Incidental "Direct" Injuries, Recovery for Them Is Barred by *Noerr*

The complaining truckers in *Noerr* sought to counter the railroads' reliance upon their antitrust immunity in seeking legislation by arguing that they had been "directly" injured as a result of public deceptions including notably the "third-party" technique. As the truckers stated their case:

> The unlawful object of petitioners' combination and conspiracy—elimination of long-haul truck competition—was plainly calculated to injure respondents. The injury was not exclusively legislative. The attacks on respondents were primarily directed to the public at large, including respondents' shippers and customers. The immediate aim was to foment resentment and hostility. As the District Court found, the truckers, without justification "were categorized as law-breakers, road-hoggers, completely indifferent to the safety of others on the highway and moochers on the public through failure to pay their way."

Brief of Respondents at 8, *Noerr* (No. 60-50) (citation omitted).

This Court nevertheless held that the railroads' genuine attempt to influence the legislature through its public relations campaign insulated them from Sherman Act liability even for the direct harm caused to the truckers. As the Court explained, 365 U.S. at 143-144,

> It is inevitable, whenever an attempt is made to influence legislation by a campaign of publicity, that an incidental effect of that campaign may be the infliction of some direct injury upon the interests of the party against whom the campaign is directed. And it seems equally inevitable

that those conducting the campaign would be aware of, and possibly even pleased by, the prospect of such injury. To hold that the knowing infliction of such injury renders the campaign itself illegal would thus be tantamount to outlawing all such campaigns.

The present case is no different. It is not disputed that Allied's campaign to exclude ENMT from the NEC was part of a genuine effort to influence legislation. Had Carlon actually offered any substantial proof of "direct" harm—it did not—the decision below would remain untenable under *Noerr*. The notion that Allied "marketed the stigma," adopted by the court of appeals (Pet. App. 9a n.3), offers no escape from this conclusion. Even if the evidence for this conception were substantial rather than trivial, as it was,[21] the injury thus described was at most an incidental accompaniment of the Allied campaign for legislative exclusion of ENMT. The rule of *Noerr* precludes assessing damages for such effects.

III.

WHOLLY APART FROM *NOERR*, ALLIED'S CAMPAIGN TO EXCLUDE ENMT FROM THE NATIONAL ELECTRICAL CODE DID NOT CONSTITUTE AN UNREASONABLE RESTRAINT OF TRADE

Since *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918), this Court and the lower courts have consistently applied the rule of reason to Sherman Act claims arising

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21 The "marketing" theory rested on some presentations to legislatures (Tr. 2734-36) as well as movies and brochures addressing the safety problem created by evidence of PVC toxicity (Tr. 2981-83; 2991-92; P.X. 656, at A. 1973; P.X. 655, at A. 1971). All of these activities are themselves protected by *Noerr*. And some presentations did not even mention the exclusion of ENMT from the NEC (*see* Tr. 2950-51, 3186-88). Indeed, the only materials for the public in which Allied mentioned the NFPA vote were a press release and two brochures containing factually correct, constitutionally protected discussion of toxicity (A. 1971-79). On dubieties like these, Carlon's experts purported to calculate damages ranging from $59.9 to $86.1 million (P.X. 557), and this was thought by the court of appeals to justify the jury's verdict of $3.8 million.

out of certification, standardization, and self-regulation programs of trade associations that do not involve boycotting, price fixing, or market division.[22] In applying the principles to the present case, we begin with the fundamental premise that certification and safety standard programs, and particularly code-making of the sort at issue here, serve important, procompetitive functions in our economy. "Industry-wide certification programs should be recognized not merely as consumer protection devices, but as increasingly valuable elements for building competition and manufacturing efficiency and productivity in the market hierarchy." Howe and Badger, *The Antitrust Challenge to Non-Profit Certification Organizations: Conflicts of Interest and a Practical Rule of Reason Approach to Certification Programs as Industry-Wide Builders of Competition and Efficiency*, 60 Wash. U.L.Q. 357, 357 (1982). Thus, even without regard to *Noerr*, the activity of legitimate trade groups or industry associations should give rise to liability only when their processes go awry in serious respects material under the Sherman Act.[23]

Viewed in this light, the activities of Allied in the NFPA and thereafter could not soundly be held to be an unlawful restraint of trade. There is no valid basis for finding antitrust liability where, as here, the safety standard promulgated by the NFPA

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22 *See Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985); *National Soc'y of Prof. Eng'rs v. United States*, 435 U.S. 679, 691 (1978); *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563 (1925). *Cf. Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961); *Fashion Originators' Guild v. Federal Trade Comm'n*, 312 U.S. 457 (1941).

23 *See* Wachtel, *Product Standards and Certification Programs*, 13 Antitrust Bulletin 1, 10-11 n.25 (1968):

> Commenting on the consent decree in *United States v. Southern Pine Ass'n*, 1940-1943 Trade Cas. ¶ 56,007 (E.D. La. 1940) (which expressly excluded standard-making from its coverage) then Assistant Attorney General Thurman Arnold said: '. . . standardization programs in and of themselves are not condemned by the Department. It is the wrongful use to which such programs have been put that has been questioned' (quoted in Pearce, *Trade Association Survey*, TNEC Monograph No. 18 at p. 318 (1941)).

was not only substantively valid, but was also the product of a lawful procedure that gave Carlon full access to the decision-making process.

A. The Good Faith Exclusion of ENMT From The National Electrical Code, Supported by Objective Scientific Evidence, Was Not an Unlawful Restraint of Trade

Carlon's concession at trial that the safety standard sought by Allied was supported by objective scientific evidence should be dispositive under the rule of reason. The dissemination of information can wrongly suppress competition only if the information is false. Bringing accurate information into the marketplace *promotes* competition by enabling consumers to make more educated choices. *See* Howe & Badger, *supra*, at 378. Additionally, the dissemination of accurate safety standards encourages the participation of more competitors in the marketplace: "By manufacturing in accordance with standards the small businessman may reduce design costs and, by evidencing compliance with standards, offset some of the marketing advantages of his larger competitor." *Id.* at 12. *See* Wachtel, *Product Standards and Certification Programs*, 13 Antitrust Bulletin 1, 10-13 (1968). As this Court said in *Maple Flooring Manufacturers Association v. United States*, 268 U.S. 563, 583 (1925):

> Free competition means a free and open market among both buyers and sellers for the sale and distribution of commodities. Competition does not become less free merely because the conduct of commercial operations becomes more intelligent through the free distribution of knowledge of all the essential factors entering into the commercial transaction.

Sherman Act liability is ordinarily not imposed for the dissemination of information about a product unless the information being spread is false.[24] Holding Allied liable for spread-

24 Of course, this Court has found Sherman Act liability for the dissemination of truthful information when that dissemination accompanies and facilitates a price-fixing or boycotting conspiracy. *See, e.g., Fashion Originators' Guild of America, Inc. v. Federal Trade Comm'n*, 312 U.S. 457 (1941) (boycott); *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921) (price-fixing); *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600 (1913) (boycott). But the present case does not involve any of these activities that *per se* violate the Sherman Act. Allied was not found to have participated in a boycott of Carlon or its product, or to have sought the exclusion of Carlon from the NFPA's standard-setting process.

ing the truth about Carlon's product through the NFPA proceedings and thereafter, even for doing so jointly, would be an unprecedented and dangerous expansion of the Sherman Act. *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982), provides an illustrative contrast. In *Hydrolevel*, this Court found the American Society of Mechanical Engineers ("ASME") liable for the intentional misinterpretation of one of its safety codes by an ASME member acting in ASME's name. The member had fabricated the misinterpretation, contained in a letter the member had written for an ASME subcommittee, to disparage Hydrolevel's product. That false, misleading, and harmful action by an ASME agent was held to violate the antitrust laws. *See also Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961).

The Court in *Hydrolevel* expressly noted that the dissemination of information supported by objective scientific evidence would present a very different case: "[W]e do not face a challenge to a good faith interpretation of an ASME code reasonably supported by health or safety considerations." 456 U.S. at 577.

As suggested by this caveat in *Hydrolevel*, a plaintiff asserting anticompetitive consequences resulting from the issuance of a safety code or standard usually attacks the technical validity of the standard. That is, the antitrust claim is based on the charge that the standard itself was not bona fide. Although this Court has not yet squarely faced the issue, lower courts considering antitrust challenges to safety standards have con-

sistently rejected such challenges when the standards have been determined to be valid. *See, e.g., Eliason Corp. v. National Sanitation Foundation*, 614 F.2d 126 (6th Cir.), *cert. denied*, 449 U.S. 826 (1980); *Structural Laminates, Inc. v. Douglas Fir Plywood Ass'n*, 261 F. Supp. 154 (D. Or. 1966), *aff'd*, 399 F.2d 155 (9th Cir. 1968), *cert. denied*, 393 U.S. 1024 (1969); *Roofire Alarm Co. v. Royal Indemnity Co.*, 202 F. Supp. 166 (D. Tenn. 1962), *aff'd*, 313 F.2d 635 (6th Cir.), *cert. denied*, 373 U.S. 949 (1963).

Here, Allied spoke the truth and misrepresented nothing, broke no law, and pressed a genuine concern for safety while it unquestionably sought a commercial advantage over Carlon. Whether or not a jury calls such conduct "subversive," the Sherman Act does not reach it.

B. NFPA Procedural Fairness and the Absence of Antitrust Injury Negate Any Claim of Sherman Act Liability Resulting from Block Voting

Even if technical validity did not end the matter, the manner of the NEC's adoption did not cause Carlon cognizable antitrust harm. Promulgation of the NFPA's electrical conduit standard passes any pertinent test of procedural fairness. The jury's specific fact findings—that Allied did not violate the NFPA's rules, that the rules were fair, that the NFPA membership vote did not effectively determine whether Article 331 would be excluded, and that Allied did not deprive Carlon of full and effective access to the NFPA (J.A. 24)—make this clear. *Cf. Silver v. New York Stock Exchange*, 373 U.S. 341, 361 (1963).

These findings negate any claim that Allied deprived Carlon of a fair hearing at the NFPA. The Sherman Act does not prescribe rules of procedure or limit pressure tactics within a private standard-setting organization any more than it regulates shareholder conduct within a corporation, the internal behavior of members of a partnership or the membership of a club or trade association. *See Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 293

(1985). So far as the Sherman Act is concerned, it is the *external* result—the outward behavior of the entity—that is to be judged when there is a claimed restraint of trade. If that behavior is price-fixing or a boycott, it violates the Sherman Act. There is no such violation where, as here, the behavior is withholding (or causing the withholding of) organizational approval for a product for which there is objective, scientific evidence of life-endangering toxicity.

Since the Sherman Act's adoption, this Court has consistently applied the Act only to those commercial activities that either directly or by analogy could be regarded as "comparable to restraints deemed illegal at common law," namely,

> contracts for the restriction or suppression of competition in the market, agreements to fix prices, divide marketing territories, apportion customers, restrict production and like practices, which tend to raise prices or otherwise take from buyers or consumers the advantages which accrue to them from free competition in the market.

Apex Hosiery Co. v. Leader, 310 U.S. 469, 497-98 (1940). "Subversion" (without even violation) of NFPA rules does not meet that test.

The subversion finding, read most generously, could mean no more than that Allied acted unethically in its campaign to have the NFPA adopt a scientifically supportable safety standard. This finding is insufficient to ground Sherman Act liability. "It has long been recognized that there are many unfair methods of competition that do not assume the proportions of Sherman Act violations." *Federal Trade Comm'n v. Cement Inst.*, 333 U.S. 683, 694 (1948). Conduct that violates ethical standards—even unfair competitive conduct that injures competitors—does not violate the Sherman Act unless the activity itself directly restrains trade.

In a series of cases, the lower federal courts have followed this Court's lead and held that unfair competition, even when the product of group action, does not necessarily violate the Sherman Act. The decision in *Sutliff, Inc. v. Donovan Cos.*, 727 F.2d 648 (7th Cir. 1984), is illustrative. Allegations that

defendants used unethical means to purchase oil below cost, which they then resold below the market price, were held not to state a Sherman Act claim:

> From an antitrust standpoint it is as if the complaint alleged that the defendants were fences who brought [sic] oil at cut-rate prices from thieves and then resold it in competition with legitimate dealers at lower prices than those dealers could sell their oil. This would be a species of unfair competition like stealing a competitor's trade secret or using false advertising to divert a competitor's customers to oneself; but none of these things are antitrust violations; unfair competition, as such, does not violate the antitrust laws.

Id. at 655.[25]

To establish antitrust liability, more than unfair competition must be proved. There must be an unreasonable restraint of trade by direct intervention in the market, such as a boycott, price fixing, or monopolization—an element lacking here. In addition, the conduct must cause antitrust injury. That too is lacking.

To prevail, a plaintiff must show its injury was "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Carlon's injury, whether seen as the exclusion of its product from legislative codes or as the stigma supposedly attaching to ENMT because its toxicity was validly bought into question by

25 *See also Craig v. Sun Oil Co.*, 515 F.2d 221 (10th Cir. 1975) (business tort based on fraudulent misrepresentations was not a proper Sherman Act case), *cert. denied*, 429 U.S. 829 (1976); *Summey v. Ford Motor Credit Co.*, 449 F. Supp. 132 (D.S.C. 1976) (allegation that purchasers of repossessed and resold autos were misled into not claiming surplus due them failed to assert a claim under the Sherman Act), *aff'd*, 573 F.2d 1306 (4th Cir. 1978); *Arizona v. Cook Paint & Varnish Co.*, 391 F. Supp. 962 (D. Ariz. 1975) (allegation of false advertising did not state a claim under the Sherman Act), *aff'd*, 541 F.2d 226 (9th Cir. 1976), *cert. denied*, 430 U.S. 915 (1977).

the NFPA at Allied's instance, is simply not injury "of the type the antitrust laws were intended to prevent."

C. Construing the Sherman Act to Proscribe Allied's Conduct Would Violate Allied's Rights Under the First Amendment

On Carlon's own theory, its injury stems from Allied's dissemination to architects, builders, and consumers of information (1) concerning ENMT that even Carlon concedes was scientifically based and technically justified, and (2) concerning an action, the NFPA determination, that Allied had helped by procedurally proper means to bring about. Such activity—which amounts to nothing more than a form of commercial advertising—is protected by the First Amendment in almost the same way that the prime goal of "petitioning" legislatures is protected.

In *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), the Court noted that "[t]here is no longer any room to doubt that what has come to be known as 'commercial speech' is entitled to the protection of the First Amendment, albeit to protection somewhat less extensive than that afforded 'noncommercial speech.' " *Id.* at 637. The constitutional protection afforded commercial speech turns both on the nature of the speech and on the governmental interests served by its regulation:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557, 566 (1980).

Application of this test to Allied's speech and petitioning activities should invalidate the decision below under the First Amendment. Allied engaged in no false or misleading communications. It pressed serious and genuine problems of safety. There is no substantial interest under the Sherman Act in suppressing or punishing such conduct.

On our primary thesis, there is no need to reach the First Amendment issue. The cautionary concerns for speech in *Noerr* are sufficient here—together with a sound reading of the Sherman Act to begin with—to require reversal. It has seemed appropriate, nevertheless, to note at least the strong likelihood that there would otherwise be a direct conflict between the decision of the court of appeals and Allied's First Amendment rights.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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